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IN THE

Supreme Court of the United States

(October Term, 1924)

No. 284

STATE OF COLORADO, *Appellant*,

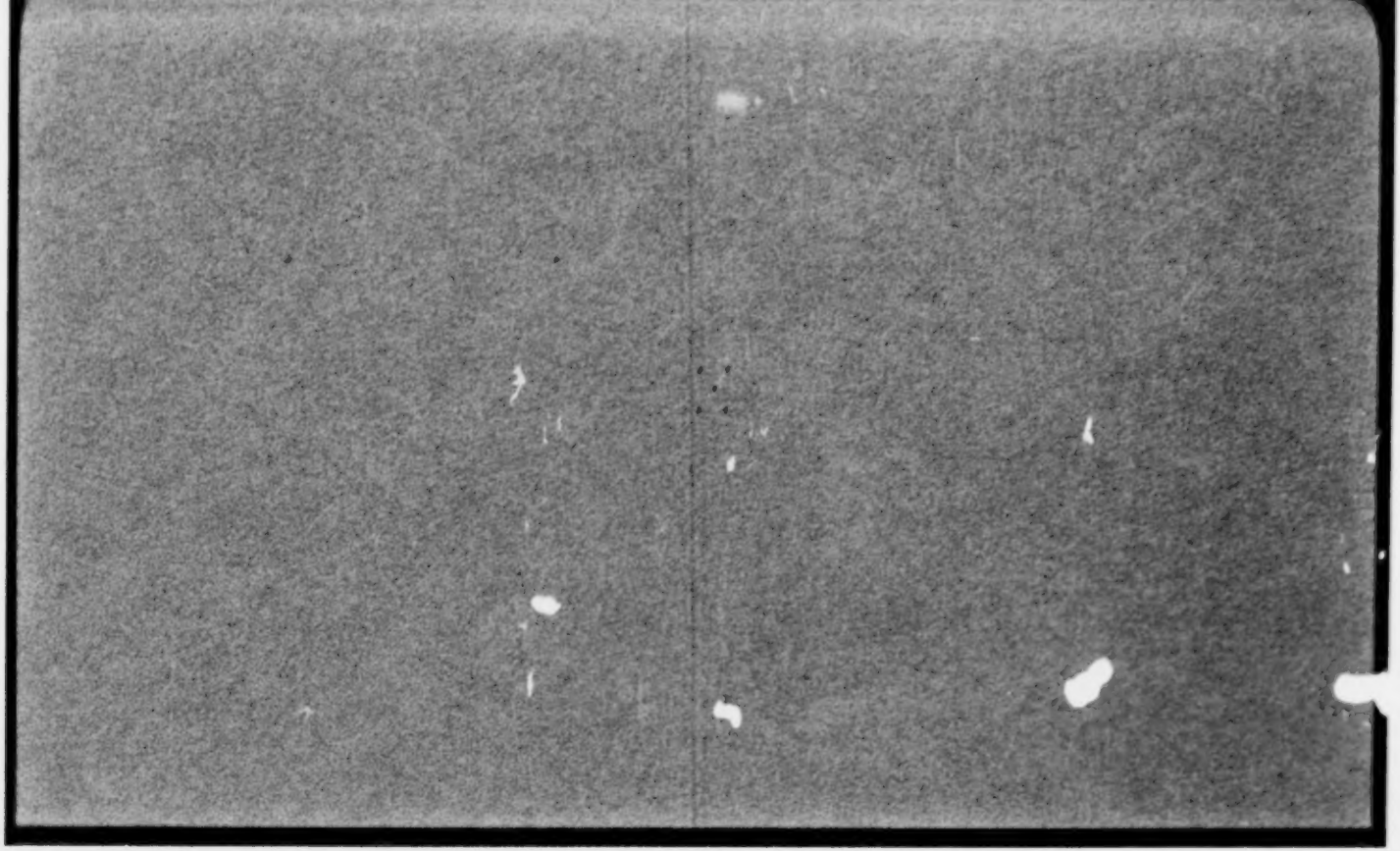
vs.

ROGER W. TOLL, Superintendent of Rocky Mountain National Park, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO FOR THE WESTERN DIVISION.

(Error)

BRIEF FOR APPELLEE.



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IN THE

Supreme Court of the United States

(October Term, 1924)

No. 234

STATE OF COLORADO, *Appellant*,

vs.

ROGER W. TOLL, Superintendent of Rocky Mountain National Park, *Appellee*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOT THE DISTRICT OF COLORADO.

(29993)

BRIEF IN BEHALF OF APPELLANT.

STATEMENT.

This was a bill in equity in the District Court of the United States for the District of Colorado, brought by the State of Colorado under the direction of the Governor, to enjoin Roger W. Toll, as Superintendent of the Rocky Mountain National Park, from enforcing certain rules with respect to the use of public highways existing within the limits of the "Rocky Mountain National Park", which rules

were averred to be in excess of the lawful authority conferred on the defendant and his superiors, the Director of Park Service and the Secretary of the Interior by the Acts creating and defining this Park. It was charged the Secretary of the Interior and the Director of Park Service asserted full power and authority and control of the use of all such highways, to the exclusion of the lawful jurisdiction and sovereignty of the State of Colorado, and that under such assertions the defendant excludes citizens of the State from making use of such highways.

The defendant moved to dismiss the bill on eight specified grounds, the first being that the United States is a necessary party. The second, third, fourth, fifth and sixth grounds are in effect merely by way of elaboration of the first ground. The seventh and eighth aver the insufficiency of the bill.

This motion was granted, it being stated at the time by the Judge that the ruling was made under authority of Charles Robbins v. United States of America, 284 Federal, 39.

The dismissal was thus on the merits and not on account of the view that the United States was a necessary party, although no memorandum of the Judge's ruling in this regard is incorporated in the record.

The appeal is prosecuted under Section 238 of the Judicial Code, the case involving the construction and application of the Constitution of the United States and the constitutionality of a law of the United States.

SUMMARY OF COMPLAINT.

The bill (p. 1) avers with particularity the various acts which are complained of and which are claimed to interfere with the rightful sovereignty of the State of Colorado with respect to the roads in question, and actual interference by defendant with the vested rights of property of citizens

of the State, in respect of using these public highways and in respect of their right of ingress to and egress from their lands located within the confines of this Park.

It appears from the bill that the defendant is superintendent of the Park, in control thereof under authority of the Secretary of the Interior, and limited in respect of control of said Park by the provisions of the Act establishing it.

The Park now embraces an area of approximately four hundred square miles of territory located in the Counties of Grand, Larimer and Boulder, and it was created under the provisions of the Act of January 26, 1915 (38 Stat. L. 798).

The Park was enlarged by the provisions of the Act of February 14, 1917 (39 Stat. L. 916).

The National Park Service was established by the Act of August 25, 1916 (39 Stat. L. 535), and thereby it was provided that the Director of National Park Service shall, under the direction of the Secretary of the Interior, have the supervision, management and control of the several national parks and national monuments which are all under the jursidiction of the Department of the Interior.

The Park area includes the greater portion of the district known as the "Estes Park District", which is a region of great natural scenic attractions, and for many years prior to the creation of the Park this region had been known throughout the United States as a place of desirable resort for recreation, and throughout the years the fame of this district has constantly increased so that the number of people visiting it is now in excess of two hundred thousand per annum. Included within the Park are numerous extensive holdings of land in private ownership, which became vested long prior to January 26, 1915 (p. 2).

The population center of the Estes Park region is the village of Estes Park, an incorporated town of the State

of Colorado located about a mile east of the east boundary of the Park. On the east side of the village a road runs south skirting the Park on the way to Denver, by way of the Towns of Ward and Lyons. The Lyons-Longmont road runs southeasterly connecting through the Town of Lyons with the City of Longmont in Boulder County. The Thompson Canon road extends through the canon of the Thompson River and connects with the City of Loveland, and by branch line with the City of Fort Collins, both of which are located in Larimer County. Loveland, Longmont and Fort Collins are located on the main north and south highway extending from the Wyoming State line through Denver, Colorado Springs and Pueblo, to the New Mexico boundary. A road recently completed, called the "Fall River Road", follows the course of the Fall River, crossing the Divide and joining the main road on the west side of the Continental Divide at the Town of Grand Lake. Other roads connect Estes Park Village with Horseshoe Park, Moraine Park, Bartholf Park and other valleys within the Rocky Mountain National Park. Still other roads provide means of access to numerous points of interest and attraction located within the Park and in the vicinity thereof. Located along the roads within the Park and also in the district contiguous thereto on the east side thereof are divers hotels affording accommodations to travelers and guests, which were built long prior to the passage of the Act creating the Park and numerous cottages and dwellings have been erected and are owned by citizens of the State and others, on lands held in private ownership (p. 3).

All the roads affording access to the Park were in existence, and the lands held in private ownership were possessed long prior to January 26, 1915, and these roads were built and maintained by the counties in which they are located, or by such counties in cooperation with the State of Colorado. These highways were built under authority of the Act of 1866 (R. S. U. S. 2477), granting authority to establish highways on the public domain.

The roads in question afford the only means of access to privately held lands.

These highways upon their establishment came under the general jurisdiction of the State, and the right to make use of them became vested in the general public under the sovereign control of the State, which is vested with the general police power and right to regulate and safeguard the use of such roads by the general public, and this power has never been surrendered or ceded, and jurisdiction over these highways continues and exists in like manner as with respect to all other highways within the State (p. 3).

Almost the entire expenditure in the construction of Fall River Road has been borne by the State. This road traverses lands of the United States and lands of three private proprietors. It was completed at an expenditure in excess of $200,000.00. Since the creation of the Park the federal government has expended, in making a survey for a proposed alternative line for the Fall River Road and incidental maintenance, not exceeding in total amount the sum of $5,000.00.

The appropriations made by the Congress have been required and used almost entirely for administrative purposes, so that virtually no development has been made of the Park by federal agencies.

The economic development of Estes Park region was brought about and rendered possible by the expenditures made by the State and the Counties of Larimer, Grand and Boulder in the construction of the main approach roads to Estes Park Village, and secondary roads leading to points of interest, and consequent thereupon much money has been invested by citizens of the State in building homes, summer cottages, hotels and other facilities. These were built on lands privately held. The hotels in the district, both those within and without the confines of the Park, have customarily in the past afforded means of transportation to guests and others on sightseeing trips and visits to other hotels

and places, and only by reason of the affording of such service by the hotels have the various points of scenic interest been made accessible to visitors (p. 4).

Certain general rules and regulations for the government of the Park have been promulgated by the Secretary of the Interior.

These are as follows (From the "General" Regulations):

"6. Private Operations.—No person, firm or corporation shall reside permanently, engage in any business, or erect buildings in the park without permission in writing from the Director of the National Park Service, Washington, D. C. Applications for such permission may be addressed to the Director or to the superintendent of the park. Permission to operate a moving-picture camera must be secured from the superintendent of the park.

"18. Fines and Penalties.—Persons who render themselves obnoxious by disorderly conduct or bad behavior shall be subjected to the punishment hereinafter prescribed for violation of the foregoing regulations, or they may be summarily removed from the park by the superintendent and not allowed to return without permission in writing from the Director of the National Park Service or the superintendent of the park.

"Any person who violates any of the foregoing regulations shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceeding."

("Special" Automobile Regulations):

"2. Automobiles.—The Park is open to automobiles operated for pleasure, but not to those carrying passengers who are paying, either directly or indi-

rectly, for the use of machines. (Excepting, however, automobiles used by transportation lines operating under Government franchise.)

"Careful driving is demanded of all persons using the roads, the Government is in no way responsible for any kind of accident.

"16. Fines and Penalties.—Any person who violates any of the foregoing regulations shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500.00 or imprisonment not exceeding 6 months, or both, and be adjudged to pay all costs of the proceeding, and such violation shall subject the offender to immediate ejectment from the park. Persons ejected from the park will not be permitted to return without prior sanction in writing from the Director of the National Park Service or the superintendent of the Park" (p. 5).

The Secretary of the Interior and the Director of the National Park Service assert that under the foregoing rules, they have full power and lawful authority to regulate the use of all highways located within the Park, to the exclusion of all authority possessed by the State of Colorado, with respect to the control, maintenance, management and supervision of the use of said roads, and the defendant, acting under directions of his superiors, asserts the right and power to exclude any person or persons, except on conditions prescribed by the Secretary of the Interior and enforced by the defendant, and under the terms of Section 2 of "Automobile Regulations", defendant has refused permission to anyone operating automobiles for hire, with the exception that a permit for such operation has been issued to a certain corporation engaged in such transportation business, which permittee or licensee is denominated in said Rule 2 as a "franchise" holder.

The Secretary and the Director have on numerous occasions announced the policy of the Department not to grant

to others any right of use of any of the roads located in the Park in operating automobiles for hire, regardless of whether the applicant desires to engage in the public utility business of acting as a common carrier over fixed routes and on established schedules, or seeks merely the right, as hotel keeper, or otherwise, to carry passengers for hire under individual contracts of employment and under the direction of the passengers engaging such special service. Applications made to the Director for permits to operate either a public utility business or an automobile service under special hiring, have been refused or ignored (p. 6). Permits for the use of automobiles privately owned and operated and not for hire have not as yet been required. Nevertheless, the Secretary and Director have continuously asserted the right under the provisions of the several Acts above referred to, creating the Park, to require permits as a condition to entering it, and to exact fees for the use of vehicles, and in the operation of other national parks have allowed only those persons who hold permits to enter the same, and have exacted license fees.

Under the operation of the rules, the defendant has prevented the transportation of persons or goods for hire from Estes Park Village over the highways of complainant to privately owned lands belonging to citizens of the State, and thereby has interfered with and impaired an essential right of said citizens in the ownership of their lands, in violation of the provisions of Sections 2 and 3 of the Act of January 26, 1915 (38 Stat. L. 800).

In 1922 the defendant excluded citizens from the lawful use of the public highways and has threatened to and will continue to exclude citizens therefrom.

The cities of Denver, Boulder, Loveland and Fort Collins are the main starting points for travelers desiring to visit the "Estes Park District", and in these cities are numerous companies engaged in the business of furnishing automobiles for hire. Many thousands of people annually

who visit this district prefer to engage the use of such automobiles rather than those of the holder of the so-called "government franchise". In the event a tourist engages the use of a car from other than the "franchisee", upon arrival at Estes Park, if he desires to travel within the National Park, he is obliged to make use of the service afforded by the holder of the government franchise, and thereupon pay for "waiting time" of the automobile which he has engaged. Upon information and belief not less than 10,000 persons in the year 1921 were thus prevented from seeing the scenic attractions of the Park.

Further, under the application of the rules prescribed, in event a visitor to any one of the hotels located in the Estes Park region desires to engage an automobile for a sightseeing trip, including conveyance over any road located within the confines of the Park, he must engage an automobile from the "franchisee", and such visitor is thereupon required to pay for such car from the time it leaves Estes Park Village going to the place where the visitor is found and thence returning, greatly to the impairment of the freest use of such Park, to which use the same was dedicated by the Acts of Congress referred to.

Under the application of Rule 16 of "Automobile Regulations", citizens of the state have not been permitted to return to the national park, and this without any previous determination of guilt of such persons under Rule 2, with respect to automobiles and without any ejectment from the Park, as mentioned in Rule 16.

Under the terms of Rule 18 of the "General Regulations", defendant asserts that as superintendent of the Park, he may in his discretion remove any persons who render themselves "obnoxious by disorderly conduct or bad behavior" as determined by himself alone, and thereupon such persons may be banished from said Park. The predecessor of defendant in the office of superintendent has on divers occasions acted under such assertion of power (pp. 7 and 8).

The State of Colorado has heretofore asserted and exercised its general police power with respect to motor vehicles operating on the public roads, and has enacted certain legislation whereby a code of rules has been adopted, controlling the use of all the public highways, which code covers all regulations deemed necessary by the State for the protection of life and property in the use of such highways (p. 8).

Under the Act of 1915, it is provided by Section 3 that "no lands located within the Park boundaries now held in private, municipal or state ownership shall be affected by or subject to the provisions of this Act".

By Section 4, the Secretary of the Interior is authorized "to make and publish such reasonable rules and regulations not inconsistent with the laws of the United States, as said authority may deem necessary or proper for the care, protection, management and improvement of the same, the said regulations being primarily aimed at the freest use of said Park for recreation purposes by the public, and for the preservation of the natural conditions and scenic beauties thereof."

Although by these provisions no authority is conferred on the Secretary to interfere with the common use and enjoyment of the roads in question, and under the provisions of the Tenth Amendment to the Constitution, this power could not be conferred by Congress, and although by the provisions of these sections, the rights of persons holding real estate in private ownership within the Park, and the right of the State with respect to highways, are expressly excepted from the operation of the Act, the Secretary and Director assert and will continue to assert their right, at their sole discretion, to exclude the public generally from such highways, or to prescribe, in their uncontrolled will, the conditions under which the same may be used, greatly to the injury of complainant and its citizens.

The defendant has exceeded the lawful authority entrusted to him under the Acts in question and has sought

to divest the vested rights of citizens of the State in contravention of the Fifth Amendment to the Constitution, and has violated and held for naught the provisions of the Tenth Amendment to the Constitution of the United States (p. 9).

The acts committed by defendant are in derogation of and in conflict with the rights of the complainant, and in event the usurpation of power should be permitted to go unchallenged, the complainant fears and has good reason to fear that such wrongful extension of Federal jurisdiction may be applied by the Secretary of Agriculture with respect to existing forest reserves established in the state under the authority conferred upon that official in the Acts providing for the establishment of such reservations, whereby authority is given "to make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use and to preserve the forests thereon from destruction" (26 Stat. L. 1103; 30 Stat. L. 35; 33 Stat. L. 628), the grant of power to regulate the use of the forest reservations being in substance identical with the grant of power to regulate the use of the Rocky Mountain National Park.

All of the main highways across the Rocky Mountains, connecting the eastern and western portions of the state, traverse either forest reservations or this Park.

Under such assertions of power complainant may be wholly divested of its authority and the right to use virtually all of its highways may be limited to those holding concessions or permits issued by or under the authority of the United States, and the wrongful assertion of Federal power herein complained of is a matter of common and general interest to all the citizens of the State.

The complainant is in duty bound to protect the vested rights of its citizens in the use of public highways, and also to protect the rights of those of its citizens who are owners of lands within the confines of the National Park,

with respect to the means of ingress to and egress from such lands, and likewise to safeguard the investment made by itself and by the Counties of Larimer, Grand and Boulder in the construction of roads within the Park, to the end that the purpose of the establishment of such roads shall not be defeated; and that it is in duty bound to safeguard and protect its sovereign right against the encroachments of usurpers of authority (p. 10).

The amount involved in this controversy exceeds, exclusive of interest and costs, the sum of $3,000.00 (p. 14).

General relief is prayed and also specifically, that the Court determine that Rules 6 and 18 of the "General Regulations", and Rules 2 and 16 of the "Special Regulations" are void, and that it be thereupon determined that the defendant is without power or right, under such regulations or otherwise, to prohibit the free use of such highways, or to impose as a condition of their use the issuance of a permit, or imposition of license fee for so doing (p. 11).

The motion to dismiss is found at page 13 of the transcript, the judgment of dismissal at page 15.

ASSIGNMENT OF ERRORS.

I.

It appears from the allegations of the complaint that the State of Colorado has never ceded its sovereign rights, jurisdiction, or police power to the United States in respect of the Rocky Mountain National Park or the roads therein constructed by it or under its authority under the grant contained in the Act of 1866 (14 Stat. 253 (fol. 33), granting rights of way for highways on the public domain, and the determination of the court is therefore in conflict with Article 1, Section 8, Subdivision 17, of the Constitution of the United States.

II.

The effect of the decree is to divest the power, authority, and sovereignty held and reserved by the State of Colorado, in conflict with Article 10 of the amendments to the Constitution of the United States.

III.

The effect of the decree is to divest the vested rights of citizens of the State of Colorado to travel over the highways of the state, the rights of way to which were granted by the United States under the Act of 1866 (14 Stat. 253), in violation of the Fifth Amendment to the Constitution of the United States.

IV.

The decree of dismissal permits and authorizes an unwarrantable extension of the power and control vested in the Secretary of the Interior (and exercised by defendant under the direction of the said secretary) by the Acts of January 26, 1915, and February 14, 1917 (38 Stat. 798 and 39 Stat. 916), creating and extending the Rocky Mountain National Park, and the Act of August 25, 1916 (39 Stat. 535), establishing the National Park Service, which authorizes the promulgation of reasonable rules and regulations

applicable to the Rocky Mountain National Park; and Rules 2 and 16 of the Auto Regulations and Rules 6 and 18 of the General Rules and Regulations concerning national parks, as enforced by defendant, are unreasonable and arbitrary and in their terms and by their application create a monopoly and exclude from their operation all citizens of the state and others, save only the company conducting transportation lines under a government franchise.

Hereunder the decree so construes the aforesaid Federal Acts erroneously and in conflict with the language of the same, which requires the regulations to be reasonable and to be aimed at the freest use of the park.

V.

By the decree the right of the defendant is upheld to exert executive authority over lands and highways within the Rocky Mountain National Park, contrary to the provisions of the Act of January 26, 1915 (38 Stat. 798), establishing said park, which provides:

> "That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect rights of any such claimant, locator, or entryman, to the fullest use and enjoyment of his land."

And also:

> "That no lands located within the park boundaries, now held in private, municipal, or state ownership, shall be affected by or subject to the provisions of this act."

VI.

The decree sanctions continued trespasses by the defendant and those acting under him, committed and to be committed on the highways of complainant, located within

the Rocky Mountain National Park, and also the divestiture of claimant's title and the divestiture of the rights of all its citizens to enjoy the use of such highways, subject only to the lawful regulations enacted, adopted and to be adopted by claimant in the exercise of its prerogative as a sovereign state.

VII.

The decree construes the Act of January 26, 1915 (38 Stat. 798), and upholds it to the extent of declaring it to be efficacious to authorize an interference with the vested rights of the owners of lands within the limits of the Rocky Mountain National Park, in respect of their use and enjoyment thereof, and their rights of ingress and egress thereto, and if such construction of said act is tenable the effect thereof would make it in conflict with the provisions of the Fifth Amendment to the Constitution of the United States, and thereupon it was the duty of the court to hold and determine that the said act so construed is void.

VIII.

The decree sanctions an unwarranted application of and erroneously construes Rules 6 and 18 of the General Regulations governing national parks, and Rules 2 and 16 of the Auto Regulations applicable to such parks, as promulgated by the Secretary of the Interior and enforced by defendant, so as to permit the defendant to exclude all persons, without regard to their fitness or financial reliability and without regard to compliance by them with any reasonable prerequisites required by defendant or his superiors, from operating automobiles for hire on the state highways within the Rocky Mountain National Park, except only the holder of the monopoly franchise, and thereby upholds the executive authority in the assertion of power arbitrarily, whereas, the lawful test of the said rules is that they must be reasonable in their application.

IX.

The decree upholds the defendant in the assertion and enforcement of general police power within the State of Colorado, not possessed by the government of the United States.

X.

It does appear from the allegations of the complaint that the Secretary of the Interior has grossly exceeded the authority conferred on him by the acts in question (38 Stat. 798 and 39 Stat. 916), and that the defendant is excluding citizens from the park, under the direction of the Secretary of the Interior, in consummation of such usurpation of power.

XI.

The rules of the Secretary of the Interior, governing parks, the enforcement of which by defendant is complained of, are not regulations, but are prohibitions of use, and are by way of conferring an exclusive and special privilege and are in excess of and prohibited by the statutes conferring control on such secretary and on the defendant as superintendent of the Rocky Mountain National Park.

XII.

The decree justifies the assertion of control by the government of the United States to the entire exclusion of the jurisdiction of complainant, and conflicts with the assertion of complainant of its rightful police power, under the Act approved April 9, 1919 (S. L. Colo. 1919, page 533), and the Act approved April 5, 1921 (S. L. Colo. 1921, page 141).

ARGUMENT.

I.

THIS IS NOT A SUIT AGAINST THE UNITED STATES.

In the argument on the motion to dismiss, counsel for defendant placed chief reliance on the decision of this Court in State of New Mexico v. Lane, Secretary of the Interior, 243 U. S. 52. In that case the State of New Mexico sought to establish, as against the Secretary of the Interior, its asserted title to certain school lands and to restrain the Interior Department from disposing of such lands.

The question presented by that bill was whether or not a certain statute possessed the quality of a grant of the land in controversy. The bill also involved the question of the character of the land at the time of the grant, because the Act in question expressly excluded such sections of land as should be mineral in character.

The object of the bill, therefore, was directly to divest the title of the United States.

The situation has no analogy to the case presented by the complaint under consideration. On the face of the bill, no one can doubt that prior to the passage of the Act of 1915, creating the Rocky Mountain National Park, the State of Colorado and its citizens did have and possess the complete title, and that the State did possess a complete control over the roads in question.

The pending suit is in an entirely different category from that of the Lane case, and others of the same class, and its falls directly within the doctrine of Cunningham v. Railroad Company, 109 U. S. 446, at 452, where it is said:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is

that he has acted under the orders of the Government.

"In these cases he is not sued as or because he is the officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

So, it was said by Mr. Justice Hughes, in Philadelphia Co. v. Henry L. Stimson, Secretary of War, 223 U. S. 605:

"The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing cases); and in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (citing numerous cases), and it is equally applicable to a Federal officer, acting in excess of his authority or under an authority not validly conferred.

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power and its merits must be determined accordingly; it is not a suit against the United States."

Again, in the case of Northern Pacific Railway Co. v. State of North Dakota, 250 U. S. 135, Mr. Chief Justice White said:

"The relief afforded against the officer of the United States proceeded on the basis that he was exerting a power not conferred by the statute to the detriment of the rights and duties of the state authority and was subject, therefore, to be restrained by

> state power within the limits of the statute. Upon the premise, upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted. * * *"

The thought is well expressed in Carolina National Bank v. State, 60 S. C. 465, 85 Am. St. Rep. 864, where the Court said:

> "Whenever the United States Supreme Court, notwithstanding the inhibition of suits against the state without its consent, rightfully assumes jurisdiction of a suit against a state officer, it is upon the ground that the officer's act is not state action, but the individual act of the person holding the office in cases where the officer's act is not authorized by a valid and constitutional statute. If authorized by valid law, the officer's act is the state's act; if not so authorized, the officer's act is his own."

Other cases fully upholding the doctrine that the action here is not one against the United States, are Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Pennoyer v. McConnaughy, 140 U. S. 1; In re Ayres, 123 U. S. 443; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196.

The recent case of State of Missouri v. Holland, United States Game Warden, 252 U. S. 416, is, on its facts, perhaps the most nearly analogous to the situation here shown. This was an action wherein the State sought to restrain the game warden from attempting to enforce the migratory bird treaty act on the ground that it constituted an unconstitutional interference with the reserved rights of the state, under the Tenth Amendment to the Constitution of the United States.

The action was predicated solely on the idea of an interference by the national government with the reserved right of the state. On the question whether a justiciable controversy was presented, the suit of Missouri did not

present a case as plain as the one at bar, because in the instant case Colorado relies on a clear title in itself.

In the Missouri case it was thought necessary to allege that the state possessed and owned the wild game within its borders, which claim might be debatable.

The decision of Mr. Justice Holmes is to the effect that an action seeking to restrain the warden from enforcing the provisions of the Act was the proper way to test the question as to the right of the federal government as against the alleged quasi sovereign rights of the state.

With respect to the allegation of title in the wild birds, it was said:

> "It is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a state." (Citing Kansas v. Colorado, 185 U. S. 125, 142; Georgia v. Tennessee Copper Co., 206 U. S. 230; Marshall D. M. Co. v. Iowa, 226 U. S. 460).

Under the authorities cited, the instant case is not one against the United States, and the complaint is good, viewed either as one to quiet the title of the state in its highways, or as one to vindicate the sovereign control of the state over territory within its limits.

It was not claimed in behalf of the defendant in the motion to dismiss that there was an absence of necessary parties, by reason of the fact that the Secretary of the Interior and the Director of the Park Service were not made parties defendant.

If such a contention had been made, it would have been without merit.

The State of Colorado is not concerned with the adoption of policies by those officers or the promulgation of rules by them, unless these policies and rules are reflected in action taken within the limits of the state, resulting in encroachments on the sovereign control of the state. Curtin v. Benson, 222 U. S. 78.

II.

THE STATE HAS THE RIGHT TO MAINTAIN THIS BILL, BOTH IN ITS CORPORATE CAPACITY AS OWNER OF THE HIGHWAYS, AND IN ITS SOVEREIGN CAPACITY AS *PARENS PATRIAE* TO VINDICATE THE RIGHT OF ITS CITIZENS.

In the case of Van Brocklin v. Anderson, 117 U. S. 151, it is said:

> "The Legislature of the state represents the public at large and has, in the absence of special constitutional restraint and subject to the property right and demands of the abutting owner, full and permanent authority over all public lands and public places."

In Prigg v. Com., 16 Pet. 537, it was said by Mr. Justice Story:

> "That police power (of the states) extends over all subjects within the territorial limits of the states and has never been conceded to the United States."

Other informing authorities declaring the basic jurisdiction of the state with respect to roads within its borders, are: Pollard v. Hagan, 3 How. 212, 223; Gibbons v. Ogden, 9 Wheat. 1, 203; New York v. Miln, 11 Pet. 102, 133; Veazie v. Moore, 14 How. 568, 574; Withers v. Buckley, 20 How. 84.

No power, in the nature of municipal sovereignty can be exercised by the United States within a state. Ward v. Race Horse, 163 U. S. 504, 511, 51[illegible]

In the case of State of Georgia v. Tennessee Copper Co., 206 U. S. 230, the state sought an injunction against the defendant company from discharging noxious gas from their works in Tennessee over the plaintiff's territory, resulting in the wholesale destruction of forests, orchards and crops in five counties of the state.

It will be observed that Georgia was not seeking relief with respect to any specific title of its own, but it was before the court in its status as sovereign and not as proprietor. The injunction sought was granted.

The Court, by Mr. Justice Holmes, says:

> "The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The state owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the state as a private owner is merely a make-weight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.
>
> "The caution with which demands of this sort, on the part of a state, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496, 520, 521. * * * But it is plain that some such demands must be recognized, if the grounds alleged are proved. When the states by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remain-

ing quasi-sovereign interests; and the alternative to force is a suit in this court. Missouri v. Illinois, 180 U. S. 208, 241. * * *

"Some pecularities necessarily mark a suit of this kind. If the state had a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The states, by entering the Union, did not sink to the position of private owners, subject to one system of private law."

It has always been true that it is peculiarly the duty of the state to prevent or abate purprestures and interferences with matters of common right, such as the use of roads and the navigation of rivers.

The nature of equitable remedy in the case of public nuisances or purprestures is stated by Mr. Justice Harlan, in the case of Mugler v. Kansas, 123 U. S. 623, at 673, as follows:

"The ground of this jurisdiction in cases of purpresture, as well as of public nuisances, is the ability of courts of equity to give a more speedy, effectual, and permanent remedy than can be had at law. They cannot only prevent nuisances that are threatened, and before irreparable mischief ensues, but arrest or abate those in progress, and, by perpetual injunction, protect the public against them in the future; whereas courts of law can only reach existing nuisances, leaving future acts to be the subject of new prosecutions or proceedings. This is a salutary jurisdiction, especially where a nuisance affects the health, morals, or safety of the community."

In the case of Coosaw Mining Co. v. State of South Carolina, 144 U. S. 550, Mr. Justice Harlan said:

"Proceedings at law or by indictment can only reach past or present wrongs done by the appellant, and will not adequately protect the public interests in the future. What the public are entitled to have is security for all time against illegal interference with the control by the state of the digging, mining, and removing of phosphatic rock and phosphatic deposits from the bed of Coosaw River."

The case of the State of Missouri v. State of Illinois, 180 U. S. 208; 200 U. S. 496, was one in which it was held that Missouri had the right to bring its action against Illinois to enjoin the continued diversion of sewage into the Chciago Drainage Canal, and thence into the Illinois River and Missouri River, which, it was claimed, constituted a nuisance, endangering the lives and health of the inhabitants of the State.

In discussing Article IV, Sec. 3, Par. 2 of the Constitution of the United States, it was said by Mr. Justice Brewer, in State of Kansas v. State of Colorado, 206 U. S. 46:

"The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. That is implied by the words 'territory or other property'. It is true that it has been referred to in some decisions as granting political and legislative control over the territories as distinguished from the states of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States, within

their limits. Appreciating the force of this, counsel for the government relies upon 'the doctrine of sovereign and inherent power'; adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that state; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the nation as a whole which belong to it, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' The argu-

ment of counsel ignores the principal factor in this article, to-wit: 'the people'. Its principal purpose was not the distribution of power between the United States and the states, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'We, the people of the United States', not the people of one state, but the people of all the states; and article 10 reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provisions for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning. As we said, construing an express limitation on the powers of Congress, in Fairbank v. United States, 181 U. S. 283, 288, 45 L. Ed. 862, 865, 21 Sup. Ct. Rep. 648, 650:

" 'We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers

granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true, when, in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.' "

In the decision of this same Kansas-Colorado case, on demurrer (185 U. S. 125), it is said (referring to the opinion in Missouri v. Illinois):

"As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriae,* trustee, guardian, or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them, thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."

The case of Wyoming v. Colorado, 259 U. S. 419, is one in which the complainant was found to be entitled to relief to restrain illegal appropriations of water, by which the prior rights of the complainant and its citizens, who were appropriators of the water of an interstate stream were injuriously affected.

If the State of Georgia had the right to enjoin the nuisance committed in the State of Tennessee, producing damage to the property of citizens of five counties of the state; if the State of Missouri had the right to seek relief by way of enjoining Illinois from committing the nuisance of causing sewage to flow into the water supply of the plaintiff state; if the State of Kansas had the right to ask relief against an act of Colorado in depriving plaintiff state of the water of the Arkansas River; if the State of Wyoming has a similar right against the State of Colorado, with respect to the waters of the Laramie, it is somewhat difficult to suggest a reason why in the case at bar, the State of Colorado has not the right in its own behalf as owner of these highways and also as sovereign, to vindicate its title and right with respect to highways within its own borders, built by itself under the authority of a grant from the national government.

III.

THE MERITS OF THE BILL.

As we have heretofore pointed out, the announced ground of the decision of the court below in sustaining the motion to dismiss, was the decision of the Circuit Court of Appeals for the Eighth Circuit, in Robbins v. United States, 284 Fed. 39.

Before approaching the discussion of that decision and its differentiation from the instant case, we consider it to be desirable to state affirmatively our position in respect of the facts of the present bill and the law applicable thereto.

(1) THE STATUTE CREATING THE PARK DOES NOT ASSUME TO CONFER AN EXCLUSIVE JURISDICTION (ACT OF JAN. 26, 1915, 38 STAT. L. 798).

Section 1 of the Act describes a tract of land located in the Counties of Grand, Boulder and Larimer in the State of Colorado, and thereupon continues that the same "is hereby reserved and withdrawn from settlement, occupancy or disposal under the laws of the United States, and said tract is dedicated and set apart as a public park for the benefit and enjoyment of the people of the United States under the name of the Rocky Mountain National Park. * * *"

Section 2 provides that "nothing herein contained shall affect any valid existing claim, location or entry under the land laws of the United States, whether for homestead, mineral right of way or any other purpose whatsoever, or shall affect the right of any such claimant, locator or entryman to the full use and enjoyment of his land. * * * The Secretary of the Interior may, in his discretion and upon such conditions as he may deem wise, grant easements or rights of way for steam, electric or similar transportation upon or across the Park."

Section 3 provides *"That no lands within the park boundaries now held in private, municipal or state ownership shall be affected by or subject to the provisions of this Act."*

Section 4 prescribes "That the said Park shall be under the executive control of the Secretary of the Interior, and it shall be the duty of said executive authority, as soon as practicable, to make and publish *such reasonable rules and regulations* not inconsistent with the laws of the United States, as the said authority may deem necessary or proper *for the care, protection, management and improvement of the same, the said regulations being primarily aimed at the freest use of said Park for recreation purposes by the public and for the preservation of the natural conditions*

and scenic beauties thereof. * * * The said authority may, *in his discretion,* execute leases to parcels of ground not exceeding twenty acres in extent in any one place to any person or company for not to exceed twenty years, whenever such ground is necessary for the erection of an establishment for the accommodation of visitors, may grant such other and necessary privileges and concessions as he deems wise for the accommodation of visitors, and may likewise arrange for the removal of such mature or dead or down timber as he may deem necessary. * * * The regulations governing the Park shall include provisions for the use of automobiles therein. * * *"

With respect to the purpose of Congress in this enactment, it is informing to examine other statutes dealing with the creation of national parks.

In the Act creating the Mount McKinley National Park (39 Stat. L. 938) it is provided, "That the said Park shall be under the *executive* control of the Secretary of the Interior."

The same language is found in the Act to establish a National Park in the Territory of Hawaii (39 Stat. L. 432).

In other instances, in the Acts creating National Parks an exclusive control is vested in the designated executive officer.

We suggest that this differentiation points to the fact that in those Parks in which "executive control" is conferred, there existed numerous outstanding vested private rights and in those instances where "exclusive control" was conferred there were few, if any, private rights vested in the area designated.

Elucidating the interpretation of the Act under consideration, it may be noted that in Section 4 of the Act creating the Hawaii National Park, in treating of the granting of leases with respect to government lands, it is pro-

vided: "But no such lease shall include any objects of curiosity or interest in said Park, or exclude the public from free and convenient approach thereto, or convey either expressly or by implication any exclusive privilege within the Park, except on the premises held thereunder and for the time granted therein."

Various other acts creating parks contain prohibitions against the grant of any "exclusive privilege within the Park", and the general policy of Congress in this respect is sufficiently indicated in all of such Acts.

Even with respect to Yellowstone National Park, which was created at a time when, as we understand it, there were no outstanding vested, private rights, it is provided in that Act (22 Stat. L. 626), "Nor shall the Secretary of the Interior, in any lease which he may make and execute, grant any exclusive privileges within said Park, except on the grounds leased."

As contrasted with the clear and explicit language of Section 3 of the Act creating the Rocky Mountain National Park, excepting all rights "held in private, municipal or state ownership", and prescribing that the Park shall be "under the *executive* control of the Secretary of the Interior, we call attention to the Act of June 3, 1916 (39 Stat. L. 243) being an Act "To accept the cession of the State of Washington of exclusive jurisdiction over the lands embraced within the Mount Rainier National Park, and for other purposes." Upon reciting the cession of the State of Washington and the acceptance thereof, the Act in its body provides, "and sole and exclusive jurisdiction is hereby assumed by the United States over such territory. * * *"

In like manner, the Act to accept the cession by the State of Oregon of exclusive jurisdiction over the lands embraced within Crater Lake National Park, expressly provides for the assumption by the United States of "sole and exclusive jurisdiction" (33 Stat. L. 521).

So, exclusive jurisdiction was assumed on cession by the State of Montana with respect to Glacier National Park (36 Stat. L. 699.)

In a number of cases Acts have been passed, authorizing the Secretary of the Interior to accept patented lands or rights of way over patented lands in the various national parks that may be donated for Park purposes. For example, Glacier National Park, 38 Stat. L. 863; Yosemite National Park, 38 Stat. L. 863; Mount Rainier National Park, Sundry Civil Appropriation Act of June 12, 1917; Sequoia National Park, 38 Stat. L. 863; Rocky Mountain National Park, Sundry Civil Appropriation Act of June 12, 1917.

So, as to those national parks created as a result of an express cession by the state, it has been felt to be necessary expressly to confer the right on the part of the Secretary to acquire vested rights of way. It is quite evident from the form of these various statutes that Congress never supposed the exclusive control and right of exclusion from public roads was or could be vested in an appointee of Congress, with respect to roads existent prior to the creation of such parks, and the legislation on the subject may be searched in vain to discover any case in which Congress has asserted the right of proprietor over such roads.

In the act creating the Rocky Mountain National Park, nothing is said concerning any control by the Secretary of the Interior over roads within the Park.

In Section 4 of the Act two subjects are treated: the first, the making and publishing of reasonable rules and regulations * * * "for the care, protection, management, and improvement of the same."

A practical definition of the scope of the use of the expression "reasonable rules" is given by the qualifying expression that the regulations shall be "primarily aimed at the freest use of said park for recreation purposes by the public."

The second subject treated in the act is with respect to the authority on the part of the Secretary of the Interior to execute leases to parcels of ground. The language here used is quite similar to that commonly used in other national park acts and it requires no argument to show what is here covered is the matter of granting rights in the land held by the United States in its capacity as proprietor.

After treating of the subject of leasing ground—necessarily the "ground" of the United States—the section reverts to the subject of regulations, and states: "The regulations governing the park shall include provisions for the use of automobiles therein."

A provision for the use of automobiles cannot, we submit, be stretched to include total prohibition of such use for hire, and particularly in view of the fact that Congress has quite consistently provided against the grant of any exclusive privileges except on the premises leased.

We have referred to several statutes, dealing with the creation of other national parks and the language employed in asserting the control assumed by the general government, as illustrative merely of the policy of the government in this regard, and not for the purpose of attempting to clear away any supposed ambiguity in the language of the act creating the Rocky Mountain National Park. We think the language there used is perfectly clear and unambiguous, and a mere reading of the statute should convince that Congress did not attempt to assume general control of the roads located within the Park. No authority is therein conferred, either expressly or by implication, upon the Secretary of the Interior to exert a right of exclusion.

Section 2 of the Act says: "That nothing herein contained shall affect any valid existing claim, location, or entry, under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever. * * *"

Section 3 says: "No lands * * * now held in private, municipal or state ownership shall be affected by or subject to the provisions of this act."

By referring to the Act of 1866 (Sec. 2477, R. S. U. S.), it will be found that this section is part of the "land laws of the United States", and this statute provides "the right of way for the construction of highways over public lands not reserved for public uses, is hereby granted."

It was under this grant that all of the roads referred to in the bill of complaint were established and built.

It seems incontrovertible that a road established and built under the grant contained in the Act of 1866, did constitute a claim or entry under the land laws of the United States, which was expressly reserved from the operation of the Act.

Such a road also comes equally within the category of Section 3 of the Act.

But without an act of cession and acceptance thereof by the national government, the conferring of power by congress on the Secretary of the Interior, would not be operative to confer a jurisdiction in conflict with the municipal law of the state.

Mr. Justice Barbour, in Wilcox v. Jackson, 13 Pet. 498 at 513, said:

> "But we go farther and say that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservations were made of it."

And in Newhall v. Sanger, 2 C to 761, it is said:

> "Grants of land * * * do not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves."

In this same case, it is said:

> "The president had and as no power to declare any lands a part of the for reserve, except public lands; and the term 'public lands' as used in the legislation of Congress, describes such lands as are subject to sale or other disposition under general laws."

Nevertheless, out of excess of caution, the Act of 1915 excludes from its operation all private and all state governmental rights.

The language employed is properly applied to roads.

In Colorado, and we believe quite generally, a county is a subordinate agency of the state, denominated correctly a "quasi municipal corporation", and with respect to any property held by a County, it is a correct use of the language to refer to it as property held in municipal ownership. (Carpenter v. People, 8 Colo. 116, at 125.)

We deem it a correct conclusion to say that in Colorado the title to the highways is vested in the Board of County Commissioners for the use of the public, and subject to paramount control by the state (Greiner v. Board, 64 Colo. 584.)

See, in this connection, Secs. 3, 1244, 1290, 1390, 8682, Compiled Laws, 1921.

Upon acceptance of the grant contained in the Act of 1866, which may be evidenced merely by general public use, the public became vested with the absolute right to the use of roads established thereunder, which could not be revoked by the general government. (Sprague v. Stead, 56 Colo. 538; Greiner v. Board, 64 Colo. 584.)

After acceptance of the grant for road under this Act, the way ceased to be a portion of the public domain. (Estes Park T. R. Co. v. Edwards, 3 Colo. Apps. 74; Wolcott Township v. Skauge, 6 N. D. 382, 71 N. W. 544.)

It is an entirely correct use of the language to speak of state ownership of highways. (American Steam Dredge Wks. v. Board of County Commissioners, 170 Ind. 571, 85 N. E. 1.) And it is equally correct to speak of county ownership of highways.

By two clear provisions of this statute, exceptions are made which expressly provide that a road in the Park shall not be affected by the Act, and under the decisions of this court, which we have cited, the result would be identical without the exceptions.

(2) AFTER THE PASSAGE OF THE ACT OF JANUARY 26, 1915, THE POLICE POWER OF THE STATE OF COLORADO WITH RESPECT TO ROADS LOCATED WITHIN THE LIMITS OF THE PARK CONTINUED UNAFFECTED BY THE PROVISIONS OF THE ACT.

In the seventh paragraph of the bill of complaint (p. 3) it is alleged that the state has never surrendered or ceded its jurisdiction over these highways.

We have already endeavored to show that the language of the Act of 1915 is not sufficient to evidence the arrogation by Congress of supreme power over existing highways, and we contend that if such purpose had been expressed the act to that extent would have been inoperative and void.

The Constitution provides: "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in

which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." (Art. 1, Sec. 8, Par. 17.)

In discussing this section of the Constitution, Mr. Justice Field, in Fort Leavenworth R. Co. v. Lowe (114 U. S. 525) said:

> "This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the legislatures of the states in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the constitution that, without the consent of the states, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defense of the country, or the discharge of other duties devolving upon it, and the consent of the states in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the states. Since the adoption of the constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the states. If any doubt has ever existed as to its power thus to acquire lands within the states, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the states to the purchase of lands within them for the special purpose named, is, however, essential under the constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the

possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the states equally with the property of private individuals. * * *

"Where, therefore, lands are acquired in any other way by the United States within the limits of a state than by purchase with her consent, they will hold the land subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from state control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits."

The companion case of C. R. I. & P. Co. v. M'Glinn, 114 U. S. 542, also expounds the law in this respect, as do the cases of Palmer v. Barrett, 162 U. S. 399; Crook, Horner & Co. v. O. P. C. H. Co., 54 Fed. 604.

In the instant case, we are dealing with a situation where Congress by Act declares a certain district, comprised in part of the land of the United States and in part of lands of private proprietors, to be a national park, and to be affected with a national use. The legislature of the State of Colorado has done nothing with respect to this declaration by the national government.

If it had definitely ceded its jurisdiction and if Congress had thereupon accepted the cession, this would not be effectual to abrogate the jurisdiction of the state over the roads located within the park. Jurisdiction cannot be ceded under the Constitution of the United States with respect to land to which the United States have no title.

The cession is operative with respect only to land held by the United States. The real title to the roads in question is vested in the general public, which is entitled under the Act of 1866, and at common law, to the right to use and enjoy the same. (U. S. v. Schwalbe, 8 Tex. Civ. Apps. 679, 29 S. W. 90; Re O'Connor, 37 Wis. 379, 19 Am. Rep. 765.)

Had there been a cession of the jurisdiction by the State of Colorado of control over these roads, the laws of the State of Colorado would at least continue to be operative, and would limit the Secretary of the Interior in the exercise of his "executive control", until such time as Congress should see fit to enact legislation in conflict with the provisions of the state law on the subject of control of use of these roads.

It can hardly be contended that the Secretary of the Interior possesses, under his "executive control" the general power of legislation.

It has been held that after cession of the territory to the United States, the municipal laws continue in force until by direct action of the new government they are altered or repealed. (Insurance Co. v. Canter, 1 Pet. 511, 542.)

In C. R. I. & P. Co. v. M'Glinn, 114 U. S. 542, it was determined that municipal laws continue in force until abrogated by the new government or sovereign.

In the case of Crook, Horner & Co. v. O. P. C. H. Co., 54 Fed. 604, it was decided that in case of a conveyance by the State of Virginia to the United States for purposes not included within those mentioned in Article I, Section 8, Paragraph 17, the lands were not subject to the provi-

sions of the Constitution in respect of exclusive control, but to the terms prescribed by Virginia's Act of cession.

It was said by Mr. Justice Gray in Van Brocklin v. Anderson, 117 U. S. 151, that:

> "Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, *including the title in lands held in trust for municipal uses,* * * * vest in the state, and not in the United States.
>
> "The Legislature of the state represents the public at large and has, in the absence of special constitutional restraint and subject * * * to the property rights and easements of the abutting owner, full and paramount authority over all public ways and public places."

2 Dillon, Mun. Corp., 4th ed., Sec. 656, cited in Cicero Lumber Co. v. Town of Cicero, 176 Ill. 9, 42 L. R. A. 696 at 702.

> "Embraced within the police powers of a state is the establishment, maintenance and control of public highways,"

was said by Mr. Justice White in Johns v. Brim, 165 U. S. 180.

The Legislature of the state has supreme control over the highways of the state. (People v. Walsh, 96 Ill. 232, 36 Am. Rep. 135.)

Referring to the police power of the state, Mr. Justice Harlan in New Orleans, etc., Co. v. Louisiana, etc., Co., 115 U. S. 650, said:

> "In its broadest sense, as sometimes defined, it includes all legislation and almost every function of

civil government. (Barbier v. Connolly, 113 U. S. 31.) As thus defined we may not improperly refer to that power the authority of the state to create educational and charitable institutions and provide for the establishment, maintenance and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps."

Article I, Sec. 8 of the Constitution of the United States, which defines the powers of Congress, neither expressly nor by implication confers upon Congress any authority to exercise the police power with respect to the control of highways located within the limits of a state, save that where the exertion of state control should come into collision with national power over interstate commerce, the authority of the state would be required to yield.

The State of Colorado, in the exercise of its undoubted police power in the control of its highways, has enacted a number of laws regulating the use of motor vehicles.

By Section 9, Chapter 16, Session Laws of 1919, every chauffeur is required to obtain an annual license from the Secretary of State of Colorado, and to pay a license fee, and the applicant is required to show that he is competent to operate a motor vehicle. The Secretary of State is further given authority to issue rules and regulations that may seem to him just and proper in the issuance of a chauffeur's license.

By Section 1 of the Act, the term "Chauffeur" is defined to mean any person who operates or drives a motor vehicle for hire, directly or indirectly, except only dealers. By the provisons of Section 1, the term "public highway" shall mean any public street, thoroughfare, roadway, alley, lane or bridge in any county or counties or city and county in the State of Colorado. (Sec. 1336, C. L. 1921, et seq.)

By Section 22 of the Act, provision is made for the revocation of this license and by Section 24, penalties are imposed for violation of the Act.

By another Act (Session Laws, 1921, Chapter 141), the Legislature of the State has prescribed a code of rules, controlling the use of all the public highways in the State of Colorado. (Sec. 1385, C. L. 1921 et seq.)

It is alleged in the bill that this code covers all regulations deemed necessary by the State for the protection of life and property in the use of such highways, and for the protection of such highways from injurious acts and practices in connection therewith. (P. 8, Transcript.)

Furthermore, the State, in the exercise of its police power in regulating and controlling its roads and the use thereof by automobiles used for hire, has asserted a restricted regulatory right by the enactment of Chapters 133 and 134, Session Laws of 1915.

These Acts declare automobile stage lines to be public utilities and to be within the jurisdiction of the Public Utilities Commission of the State, upon condition, however, that such lines are in competition with railroads. (Section 2914, Compiled Laws, 1921.)

The Acts were construed by the Colorado Public Utilities Commission in Mills v. Rocky Mountain Parks Transportation Co., P. U. R. 1920, B. 557.

So the entire field, in the matter of regulating and controlling the use of roads by automobiles, has been occupied by the state in the exercise of its lawful power.

There is no room in our scheme of government for the assertion of national power in hostility to the authorized exercise of state power, and the legislature of the state must be the judge of the necessity of state action. Collector v. Day, 11 Wall. 124.

If regulations concerning the use of the roads are to be made by the federal agency, those regulations, if valid in any respect as applicable to state highways, must conform to state law.

If it were possible to postulate here the equivalent of an act of cession by the state, and thereupon that Congress possessed power to suspend the exercise of police power of the state, it could not follow from that postulate that under "executive control" the Secretary of the Interior could supersede such state laws.

Certainly no presumptions can be indulged in that Congress intended by the Act of 1915 to supersede the state authority.

In M. K. T. & R. Co. v. Harris, 234 U. S. 412, it was held that a state law should not be set aside as inconsistent with the law of Congress unless at least there is manifested a purpose to exercise the paramount authority of Congress over the subject; so in Reid v. Colorado, 187 U. S. 137, it was determined that it should never be held that Congress intends to supersede or by its legislation suspend the exercise of police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested.

Colorado has not as yet seen fit to interfere with the business and custom of hotel proprietors in the Estes Park District in transporting their guests to points of scenic interest, nor has the state adopted the policy of granting monopolistic franchises to those using the public highways in carrying passengers and freight for hire. Insofar as the laws of the state are concerned, the hotel proprietors and the common carriers have a right to carry on their business on any public highways within the state, including all public highways within the Rocky Mountain National Park.

In the statutes of the state there is to be found neither a grant nor a prohibition of use of the public highways for purposes of common carriage. In these circumstances, the right seems to be considered in all jurisdictions as one common to all citizens who care to exercise it. (Dickey v. Davis, 76 W. Va. 576, L. R. A. 1915, F. 840 at 848.)

In view of these considerations, what possible authority can be claimed for the pronouncement of an executive fiat forbidding citizens of the state from doing those things which the laws of Colorado sanction?

It is said that nothing which is done or maintained under authority of law can be deemed a nuisance. (Jacobs v. Seattle, 93 Wash. 171, L. R. A. 1917, B. 329; Whitmore v. Brown, 102 Me. 47, 9 L. R. A., N. S., 868.)

Rule 2 of the Automobile Regulations denies the right to anyone to operate an automobile within the Park, carrying passengers "paying either directly or indirectly for the use of the machine, excepting those automobiles used by transportation lines operating under government franchise."

The bill of complaint shows that permission has been refused to anyone operating automobiles for hire with the exception that one such permit has been issued, and that this permittee is referred to in this Rule 2 as the "franchise" holder. The only conceivable sanction for this prohibition enforced by the defendant is to be found in the second paragraph of Section 3, Article 4 of the Constitution, reading:

> "The Congress shall have power to dispose of and make all needful rules and regulations, respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state."

The meaning of this provision of the Constitution is discussed by Mr. Justice Brewer, in Kansas v. Colorado, 206 U. S. 46, from which case we have already quoted. There, it is shown that an extension of the powers given under this paragraph cannot be permitted to destroy the rights of the states reserved under the Tenth Amendment.

We think that every case which may be cited, in which a right of absolute discretion to suppress action, is upheld,

it is sustained on the basis of a clear and express grant of power, and also on the determination that the legislature has authority absolutely to prohibit the performance of the act. If authority exists anywhere to grant an exclusive monopoly concession to operate on public highways of the state, it must rest in the legislature of the state.

The case of Poindexter v. Greenhow, 114 U. S. 270, dealt with the question of the usurpation of power by a state, and therein is pointed out the distinction between a government of a state and the state itself, showing that when the government of a state undertakes to pass beyond the sphere of the agency conferred upon it by the state, it is a lawless usurpation. It is not less such when the usurpation is the act of an officer of the national government, and we believe that the language of Mr. Justice Mathews, in the case, is applicable to the case of usurpation of power now before this court:

> "This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state; to say 'L'Etat, c'est moi.' Of what avail are written constitutions, whose bills of right, for the security of individual liberty, have been written too often with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon indi-

vidual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, state and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked, and of communism which is its twin, the double progeny of the same evil birth."

Under Section 4 of the Act of January 26, 1915, the United States, acting through the Secretary of the Interior, has a free and unrestricted right, except as limited by the language of the section in question, to publish any rules and regulations (meeting the test of reasonableness prescribed by the Act) with respect to the care, protection, management or improvement of land belonging to the Federal government, and within the Park area, and naturally and unquestionably the power to limit in any way desired the alienation, by lease or otherwise, of any portion of ground therein contained.

The application of the rules and regulations which the executive authority is directed to promulgate, must necessarily be limited to matters within the control and power of the United States. Any attempted exertion of power beyond this limit must be ultra vires and void. (Kansas v. Colorado, 206 U. S. 46; Williamson v. United States, 207 U. S. 425.)

The State of Colorado had the general exclusive, full and paramount power over all the highways in question (McQuillan Municipal Corporations, Sec. 1623) prior to the passage of the Act in question, and neither by the terms of that Act, nor in any other manner, has such power been curtailed or lost. Under our form of government, Congress is not competent, by any enactment in any form of words, to curtail or destroy this general control of the state.

The power possessed by the national government in the promulgation of reasonable rules is ample to assure orderly conduct and good behavior on the part of visitors, and it cannot be assumed that the State of Colorado would be derelict in the performance of its duty to protect and safeguard the rights of the traveling public in the Park, as well as elsewhere in the state.

The case of Re Guerra, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560, contains an admirable "re-statement" of the law concerning the exclusive control of the state over its own internal affairs. We quote:

> "Prior to the formation of the Federal Constitution, the states were sovereign in the full absolute sense of the term. Thurlow v. Massachusetts, 5 How. 586, 12 L. Ed. 293. By the compact which formed the Union, certain enumerated powers were surrendered to the Federal government, among which were the war powers expressly granted by article 1, Sec. 8, of the Constitution. The states remain sovereign within their separate spheres as to all powers not delegated to the general government or prohibited to the states. New York v. Louisiana, 108 U. S. 76, 27 L. Ed. 656, 2 Sup. Ct. Rep. 176. Subject to these restrictions each state is supreme, and possesses the exclusive right of regulating its own internal affairs, and in all such matters is sovereign so long as it does not conflict with the Federal Constitution. In general, the states may exercise any power possessed by them prior to the adoption of the Constitution, unless the exercise of such power is expressly or by necessary implication prohibited thereby, or interferes with the exercise of some power delegated to the United States. 36 Cyc. 828. Under our system of government the powers of sovereignty are divided between the Federal and State governments. They are each sovereign with respect to the rights committed to it, and neither sovereign with respect to

the rights committed to the other. M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579. In a word, the Constitution contemplates 'an indestructible union, composed of indestructible states.' Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237. It has been well said: 'It was a bold, wise, and successful attempt to place the people under two distinct governments, each sovereign and independent within its own sphere of action, and dividing the jurisdiction between them, not by territorial limits, and not by the relation of superior and subordinate, but classifying the subjects of government and designating those over which each has entire and independent jurisdiction.' Opinion by Justices, 14 Gray 614, 616.

"Within the scope of its enumerated powers the United States is a national sovereignty, and the Constitution and laws of the United States are the supreme law of the land. 39 Cyc. 694. But Congress has no general power to enact police regulations operative within the territorial limits of a state. That power has been left with the individual states, and cannot be taken from them, either wholly or in part. United States v. Dewitt, 9 Wall. 41, 19 L. Ed. 593; United States v. Reese, 92 U. S. 214, 23 L. Ed. 563; United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588. In this field the power of the state is unqualified and exclusive, so long as its regulations do not invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive a citizen of rights guaranteed to him thereunder. New York v. Miln, 11 Pet. 102, 9 L. Ed. 648; United States v. Cruikshank, supra; Butchers' Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co., 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; Cooley, Const., Lim., 7th ed., 831; 6 R. C. L. 191; 12 C. J. 910.

"Referring to the police powers of a state, it has been said that they are nothing more or less than the powers of government inherent in every sovereignty. License Cases, 5 How. 583, 12 L. Ed. 291. Indeed, the police power is but another name for the power of government. Mutual Loan Co. v. Martell, 222 U. S. 225, 56 L. Ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B, 529. It is an attribute of sovereignty, or rather it is sovereignty itself. Bacon v. Boston & M. R. Co., 83 Vt. 421, 451, 76 Atl. 128. It is inherent in the states of the Union, and is not a grant derived from or under a written Constitution. People v. Johnson, 288 Ill. 442, 4. A. L. R. 1535, 123 N. E. 543; 6 R. C. L. 183. The power is so essential to the welfare of the people that it has been held to be impossible for a state to devest itself of its right and duty in respect of the full exercise thereof, and, as well, that the Federal government cannot interfere in the exercise of that right and duty, except by virtue of some authority derived from the Constitution. Sabre v. Rutland R. Co., 86 Vt. 347, 364, 85 Atl. 693, Ann. Cas. 1915 C, 1269, citing numerous decisions of the Supreme Court of the United States. Subject to constitutional limitations, a state legislature is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 38, 53 L. Ed. 75, 79, 29 Sup. Ct. Rep. 10; Purity Extract & Tonic Co. v. Lynch, 226 U. S. 192, 199, 57 L. Ed. 184, 187, 33 Sup. Ct. Rep. 44.

"The limitation of state and Federal authority, and the relative force of their respective legislation, have engaged the attention of the Supreme Court of the United States more frequently, perhaps, than any other subject. For the sake of brevity, we shall notice

only a few of the decisions of that court which bear directly upon the question for decision. In Houston v. Moore, 5 Wheat. 1, 48, 5 L. Ed. 19, 30, speaking of the relative powers of the states and the Federal government, Mr. Justice Story says: 'The sovereignty of a state, in the exercise of its legislation, is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government, beyond what the people have granted by the Constitution; and, on the other hand, we are bound to support that Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly contains'."

(3) UPON THE ASSUMPTION THAT THE SECRETARY OF THE INTERIOR IS AUTHORIZED TO EXERCISE A CONTROL OVER THE USE OF THE HIGHWAYS WITHIN THE PARK, THE RULES COMPLAINED OF ARE UNREASONABLE AND TRANSCEND ANY AUTHORITY CONFERRED UPON HIM, AND THE DEFENDANT IS, THEREFORE, WITHOUT AUTHORITY TO ENFORCE THEM.

Rule 6 set out in the complaint is sufficiently drastic, prescribing as it does that "no person * * * shall reside permanently, engage in any business, operate a moving picture camera, or erect buildings upon the government lands in the park without permission in writing from the Director of the National Park Service."

It will hardly be claimed in behalf of the defendant that the application of Rule 6 is concerned with Rule 2 of the Automobile Regulations.

Rule 6 deals only with government lands in the Park and the state is not here concerned with any alleged illiberality in the application of this rule.

The phrase, "upon government lands" equally refers to "residing permanently", "engaging in any business", "operating a moving picture camera", and "erecting buildings". This rule does not deal with the use of roads. Curtin v. Benson, 222 U. S. 78.

Rule 2 evidently covers a different subject matter. This rule, concerning the use of automobiles, does not purport to be a regulation of use, but instead is a bare prohibition of use by all those carrying passengers for hire, except the government franchisee.

The status is completely disclosed by the rule, and there is no suggestion therein that any person, other than the holder of the monopoly may obtain a permit upon any terms whatever.

But lest it might be supposed that in the application of Rule 2, applications would be considered and determined on their merits, it is set forth in the bill that applications made by citizens for permits to operate have been consistently refused or ignored (p. 6).

There is nothing in the act of 1915 which suggests the thought that the matter of using roads should be covered by franchise grants.

Monopolies are odious in law and when they are claimed it is required that due authority be shown for their creation.

It is pointed out in the first portion of this brief, that even as to those parks where full control is had by the Federal government under acts of cession of the various states, in dealing with the subject of concessions, the statutes expressly provide in substance that no "exclusive privileges shall be granted except on the ground leased."

If it is possible for defendant to claim that there should be a necessary incidental control, and thereunder a police

power resident in Congress, and exercisable by the Secretary of the Interior for the protection of the property of the United States, it should, we think, be obvious that such "incidental police power" must be exercised concurrently with the police power of the state, and be held to the narrowest limits. No one can doubt that general police power is not possessed by the Federal government.

But in what manner does the Secretary seek to exercise such supposed "incidental police power"?

He asserts it by promulgating a rule which says that no one can make use of automobiles for hire within this Park.

This is under the authority conferred upon him to make "reasonable rules". These reasonable rules which he is authorized to make have to do with the use of the Park and not alone with the use of the Park, but the "freest use" of the Park.

The rule in question is not a rule with respect to the use of the Park, but is a rule providing for a prohibition of use, nor, under the rule can it be asserted that the prohibition may be insisted on or waived at the sole discretion of the executive authority.

Instead of this, the rule discloses that there is a franchise holder, necessarily so under contract, and the Secretary has thus debarred himself from acting under Rule 6 in granting other permits, even if he desired so to do.

If the two rules were to be construed together and thereupon it be thought that an arbitrary discretion remained to grant a similar permit to others, these rules would be void because unreasonable.

The law in this connection is developed by numerous decisions which deal with the right of a municipality to pass an ordinance investing the City Council or executive officers with a discretion, purely arbitrary, which may be exercised in the interest of a favored few. In such cases, the question

is to be determined on the basis of the power actually conferred.

As said by this court in Williamson v. U. S., 207 U. S. 425, in dealing with the authority of the commissioner of the General Land Office, to adopt rules and regulations for the enforcement of a statute, "* * * This power must in the nature of things be construed as authorizing the commissioner of the general land office to adopt rules and regulations for the enforcement of the statute, and cannot be held to have authorized him by such an exercise of power to virtually adopt rules and regulations destructive of rights which Congress has conferred."

In the instant case, Congress conferred the rights by the Act of 1866 concerning rights of way on the national domain, and confirmed them by the Act creating the Park.

As shown in the later case of U. S. v. Grimaud, 220 U. S. 506, the Secretary of Agriculture cannot make rules for any and every purpose, but he is confined to the matters clearly indicated by Congress. By the Act creating the Park, Congress itself has adopted the test of reasonableness as applicable to the rules and regulations which the Secretary may promulgate.

It is said in Commonwealth v. Malatsky, 203 Mass. 241, 24 L. R. A., N. S., 1168:

> "This is not a case where the city government has general control of the subject matter of the ordinance, and may impose such conditions as it pleases. * * * The power of the City of Chelsea to deal with this subject is only what is given by Rev. Laws, Chap. 104, Sec. 1; and the city authorities can in no respect transcend the authority thus given.
>
> "The general principle also has been affirmed that, at any rate in the absence of a clear expression of the legislative will, an ordinance which attempts to vest in a city council or a board of control, or some administrative officer of the municipality, the

power, not subject to review by the courts or by other higher authority, to permit or refuse to permit the carrying on of a business lawful in itself, and not prohibited by legislation, is not to be sustained. It was said by Brown, J., in Austin v. Tennessee, 179 U. S. 343, 45 L. Ed. 224, 21 Sup. Ct. Rep. 132: 'Although it was held in Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357, and in Soon Hing v. Crowley, 113 U. S. 703, 28 L. Ed. 1145, 5 Sup. Ct. Rep. 730, that a municipal ordinance prohibiting laundry work within certain territorial limits and within certain hours was purely a police regulation, such an ordinance was void if it conferred upon the municipal authorities arbitrary power, at their own will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the place selected for carrying on business.' And see to the same effect Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 Sup. Ct. Rep. 633; Plessy v. Ferguson, 163 U. S. 537, 550, 41 L. Ed. 256, 260, 16 Sup. Ct. Rep. 1138; Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239; Richmond v. Dudley, 129 Ind. 112, 13 L. R. A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; Moneyweight Scale Co. v. McBride, 199 Mass. 503, 514, 85 N. E. 870. The pursuit of a lawful business, not in itself harmful, though it may be regulated, is not, without legislative sanction, wholly to be stopped by municipal ordinances for the prevention of fire or for safeguard against some other apprehended danger. Belmont v. New England Brick Co., 190 Mass. 442, 77 N. E. 504; Com. v. Rawson, 183 Mass. 491, 494, 67 N. E. 605; Belcher v. Farrar, 8 Allen 325, 328; Austin v. Murray, 16 Pick. 121, 126; Northern Liberties v. Northern Liberties Gas Co., 12 Pa. 318; Montgomery v. West,

123 Am. St. Rep. 33 and note (149 Ala. 311, 9 L. R. A. (N. S.) 659, 42 So. 1000, 13 A. & E. Ann. Cas. 651). And see People ex rel. Weinburgh Advertising Co. v. Murphy, 195 N. Y. 126, 21 L. R. A. (N. S.) 735, 88 N. E. 117."

Other informing authorities on this subject are Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; Frazee's Case, 63 Mich. 396, 30 N. W. 72; Chicago v. Trotter, 136 Ill. 430, 26 N. E. 359; State ex rel. Makris v. Supreme Court, 113 Wash. 296, 193 Pac. 845.

All of these cases, and many more which might be referred to, lay down the rule that at least in the absence of an express grant of right to prohibit, any ordinance or law placing restrictions on "common rights", "lawful conduct", or the "lawful use of property", must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit all citizens alike to the exercise of the privilege, who will comply with such rules and conditions, and must not admit of the exercise of any arbitrary discretion by municipal authorities between citizens who will so comply. The subject is very fully treated by the annotator in 9 L. R. A. (N. S.) 659 and 24 L. R. A. (N. S.) 1168.

If it should be contended that the rights here claimed in behalf of the hotel companies to carry their guests, and the rights of the common carriers, are not "of common right" and that they are in the nature of concessions by the public, and that the legislative power may give or withhold such concession at its pleasure, and that, therefore, the general rule is inapplicable, such a contention would not avail the defendant in this case, because it cannot be shown that the United States, in respect of these roads, possessed any power to "license". The power to license is found in the police power of the state and the United States possessed no police power with respect to the control of the roads within the state. Until the state

sees fit to prohibit or restrict this use of the roads, it is a right common to all citizens who care to exercise it.

If Congress had, in relation to this park, the same general police power which the state possesses with respect to that area, and if thereupon Congress did possess power to prohibit anyone but a franchise holder from operating a public utility therein, the "automobile rule" which the Secretary of the Interior has promulgated and the defendant is enforcing, would transcend the authority which, under such assumption, would be conferred by the language of the Act creating the Park, which permits the promulgation of reasonable rules and regulations only. This is true because the general power conferred to regulate does not include an authority to grant franchises, much less to grant exclusive franchises. Authority is always limited to that conferred expressly or by necessary implication. (David v. E. T. V. & G. R. Co., 87 Ga. 605, 13 S. E. 567; Thompson v. Ocean City R. Co., 60 N. J. L. 74, 36 Atl. 1087; D. L. & W. R. Co. v. Buffalo, 158 N. Y. 266, 53 N. E. 44; Butler v. S. F. Penn Tobacco Co., 152 N. C. 416, 68 S. E. 12; C. R. I. & P. Co. v. People, 222 Ill. 427, 78 N. E. 790.)

Regulation by "permit" is allowable only where the charter or legislative power is ample and clear. (McQuillan, Municipal Corporations, Sec. 949.)

In dealing with the power of a municipality to grant an exclusive privilege to occupy its streets for railway purposes, this court in the case of Detroit Citizens Street Railway Company v. Detroit Ry., 171 U. S. 48, said:

> "The power, therefore, must be granted in express words, or necessarily to be implied. What does the latter mean? Mr. Justice Jackson, in Grand Rapids Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel-Gas Co., supra, says: '* * * that municipal corporations possess and can exercise only such powers as are "granted in express words, or those necessarily or fairly implied in, or incident

to, the powers expressly conferred, or those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable".' * * * * This would make 'necessarily implied' mean 'inevitably implied'. The court of appeals of the Sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in Wilkinson v. Adam, 1 Ves. & B. 466, that 'a "necessary implication" means, not natural necessity, but so strong a probability of an intention that one contrary to that which is imputed to the party using the language cannot be supposed.' * * * Surely, there is not so strong a probability of an intention of granting so extreme a power that one contrary to it cannot be supposed, which is Lord Hardwicke's test, or that it is indispensable to the purpose for which the power is given, or necessarily to be implied from it, which is the test of the cases. The rule is one of construction. Any grant of power in general terms, read literally, can be construed to be unlimited; but it may, notwithstanding, receive limitation from its purpose—from the general purview of the act which confers it."

Whatever can be said as to the meaning of the reference to "municipal or state ownership" in Section 3 of the Act of 1915, it cannot be doubted that lands held in private ownership are not "subject to the provisions of this Act". The right of access to the lands of citizens of the state is an attribute of ownership and a limitation of use of approach roads to such lands to the holder of the government monopoly cannot do other than curtail this essential right.

The case of Curtin v. Benson, 222 U. S. 78, dealt with certain rules enforced by the defendant as superintendent of the Yosemite National Park, which were alleged to be in excess of the power possessed by the Secretary of Interior, in prescribing rules for the government of the Park, which were also claimed to be unreasonable.

Plaintiff there was the owner of land outside the Park and also of land within the Park, and the superintendent undertook to prescribe certain conditions under which cattle of plaintiff could be driven to the land held within the Park.

In deciding the case Mr. Justice McKenna made use of the following language:

> "On the merits of the case we may concede, arguendo, as contended by the appellees and disputed by appellant, that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. Neither can be exercised to destroy essential uses of private property. The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? In answering the question we shall assume, for the time being, that Benson has interpreted correctly the regulations of the Secretary of the Interior. His (Benson's) order is not, it will be observed, a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use—an attribute of its ownership—one which goes to make up its essence and value. To take it away is practically to take his property away; and to do that is beyond the power even of sovereignty, except by proper proceedings to that end."

The test of reasonableness laid down by the Act is that the regulations are to be "primarily aimed at the freest use of said Park".

Under the application of Rule 2, concerning automobiles, the bill discloses that not fewer than 10,000 persons

per annum who desire to visit the Park, and who go in conveyances not owned by the concessionnaire to Estes Park Village are debarred from entering the Park.

It can hardly be claimed that this allows for the "freest" use of the Park, nor can it be claimed that there is a suggestion present on the face of the bill that there is an indispensable necessity in the public interest to resort to monopolies for the protection and safety of the traveling public.

If it is conceivable that such a claim might be made, it should be made by allegation and proof in the answer in justification of the rule.

In considering this subject of "reasonableness", the Court may be interested in learning of the topography, characteristics, history and economic development of the Park district. For these matters we refer to "The Rocky Mountain National Park" by Enos A. Mills. (Doubleday Page & Co., 1924.)

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(4) ROBBINS v. UNITED STATES, 284 FED. 39.

The decision of the Circuit Court of Appeals of the Eighth Circuit in this case was rendered October 2, 1922, subsequent to the commencement of the present suit, and the pendency of that action and the claims in it made by the United States afforded in large part the occasion for the action of the governor of the state in directing the commencement of this proceeding. That was an action brought by the United States in the Federal District Court against Robbins, seeking to enjoin him from transporting passengers for hire in the Rocky Mountain National Park, without written permission from the Director of the National Park Service. The plaintiff prevailed in both courts.

In the complaint in that action, Rules 6 and 18 of the "General Regulations" were relied on in the original com-

plaint, but at the hearing, Rule 2 of the Automobile Regulations was incorporated in the complaint by amendment. It was held that these rules were properly rested "on the secure footing that it is (they are) a valid exercise of control over the property of the government, even though it is of the nature of police power * * * sustained by Section 3, Article 4 of the federal constitution, which entitles the government to make all needful regulations respecting its territory and property."

It was also said that the regulations could not be successfully assailed because of interference with private rights to use the highways in the Park, citing in support of this conclusion Camfield v. U. S., 167 U. S. 518; U. S. v. Gettysburg, 160 U. S. 668; Kansas v. Colorado, 206 U. S. 46; Curtin v. Benson, 222 U. S. 78; Utah Power & Light Co. v. U. S., 243 U. S. 389.

In respect of the claim by Robbins that the rules were unreasonable as applied to him, this was said to be "inadmissible for the reason that no application was made for that purpose, and that he declined to recognize the regulations", citing Utah Power & Light Co. v. U. S., 243 U. S. 389.

Without discussion, it was said that it would be "competent if deemed necessary or prudent to limit the franchise to one approved carrier" and that "before a regulation can be regarded as invalid, it must appear that the Secretary has exceeded his authority. But not so of such as are thought merely to be illiberal or not conducive to the best results."

Although Robbins was denied the right to set up the claim of "unreasonableness", the court somewhat peculiarly says: "By this test we hold the regulations complained of to be reasonable and valid."

The principal basis for the holding in Robbins v. United States was a showing made by plaintiff there of two certain resolutions which are identical in form, one passed by the

Colorado State Highway Commission, the other by the Board of Commissioners of Larimer County.

In each, these boards "hereby release, relinquish and transfer unto the United States government and to the department thereof having control of national parks and highways therein, the control, management, maintenance and supervision *now exercised by said board*, of the public highways located and situated within the boundaries of the * * * Park."

Those resolutions are not in the record in the instant case, and the court below had no right to give them any consideration.

If the action had proceeded to trial on the merits and these resolutions had been set up in the answer of defendant, it would have been the contention of the state that they were in excess of any lawful authority possessed by these boards, and that neither of them possessed the right or the power to bargain away the jurisdiction of the state over its highways; that the resolutions undertook to deal solely with the control which the boards possessed and that neither of the boards possessed any right to exclude anyone from using the highways; that as a fact at the time these resolutions were adopted, this action was required in behalf of the United States as a mere condition under which the general government would undertake the improvement of the highways, and that the subject of the cession of jurisdiction and right of citizens was not discussed or present in the minds of any of the parties having to do with the passage of the resolutions. It is not now the time to go into those matters, simply because the resolutions are not before the Court.

If it were necessary at this time to differentiate the pending case from the Robbins case, it may be observed that a reading of the decision will show that the Circuit Court of Appeals laid stress on the fact that Mr. Robbins admittedly had not applied for a permit, but the pending

suit discloses the fact that numerous persons have applied for permits and in each case the applications have been either denied or ignored, and that it is asserted in behalf of the authorities that no permits will be granted to anyone and no right of use will be afforded to any other than the transportation company, which is the possessor of an exclusive franchise under contract with the Department.

In this connection, we contend that the Circuit Court of Appeals was in error in assuming that Rule 6 was applicable to the situation at all. As we have heretofore endeavored to point out, Rule 2 is an absolute prohibition of use, while Rule 6, dealing with the subject of permits, refers only to the occupancy of government land within the Park for business purposes

In the Robbins suit, the defendant undertook to question the "reasonableness" of an alleged rule, limiting the right of use to a monopoly, and the Circuit Court of Appeals held that conditions "might" require a monopoly grant.

Nothing in the record in the Robbins suit disclosed the circumstances or conditions prevalent in this Park, but in the pending action a very complete showing is made in the bill of complaint concerning the application of the objectionable rules, and their unreasonable character, and that the result of this application is to prevent the "freest" use of the Park to the extent that many thousands of persons are debarred from it.

In addition to this contention, the state here complains of assertions by the federal government of the right of exclusive regulation. This issue was not and could not have been presented by Robbins. The extent to which the Circuit Court of Appeals was required to go in ruling in the Robbins case was that the resolutions of the County Board and the Highway Board were of prima facie efficacy and the decision went no further than to hold that they possessed this efficacy, but here we have a direct attack by the state itself on the resolutions and the effect claimed

to flow from them. Robbins, in his defense, did not rely on the Tenth Amendment to the Constitution of the United States. In the argument presented in behalf of the United States in that case, counsel for the government especially stressed this point in the discussion of the agreements between the County and Highway Boards and the government, saying, at page 8 of the brief as filed:

> "What these agreements or understandings would amount to in a contest between the two sovereignties over the question is not presented here. Instead of a contest, each sovereignty has taken action to confirm them. If these roads be under the dominion of the county commissioners, the proper Board has transferred them (except the Fall River Road) to the Government (Record, p. 19). If they be under the dominion of the State, the State Highway Commission has transferred them (except the Fall River Road) to the Government." (Record, p. 18.)

We now have presented to the court a "contest" between the two sovereignties in a case which requires the determination of the question of extent of the right of the federal government in opposition to the right of the state government, to control the roads in controversy.

The differentiation of the issues in the Robbins case from those in that at bar is not suggested because necessary to complainant's right of action, but to point out that the court below was not justified, under its duty to follow the ruling of the Appeals court, in dismissing the present bill.

The sovereign right of the state cannot be limited by the determination reached in the Robbins case, and all of the considerations now present, including those which were urged by Robbins, are for determination *de novo* by this court.

Referring to the decision in Camfield v. United States, 167 U. S. 518, cited in Robbins v. United States, to the

effect that there was not there present a justiciable case of interference with private right, we quote from the dissenting opinion of Mr. Justice Holmes, in Ruddy v. Rossi, 248 U. S. 104:

> "I believe that this court never has gone farther in the way of sustaining legislation concerning land within a state than to uphold a law forbidding the enclosure of public lands, which little, if at all, exceeded the rights of a private owner, although it was construed to prevent the erection of fences upon the defendants' own property manifestly for the sole purpose of enclosing land of the United States. Camfield v. United States, 167 U. S. 518. * * * *At most* it was a protection of the present interest of the United States under a title paramount to the state. On the other hand, it is said in Pollard v. Hagan, 3 How. 212, 224, 11 L. Ed. 565, that no power in the nature of municipal sovereignty can be exercised by the United States within a state; that such a power is repugnant to the constitution. This case was referred to in Withers v. Buckley, 20 How. 84, 15 L. Ed. 816, and it was decided that the act of Congress authorizing the formation of the State of Mississippi and providing that the Mississippi River should be forever free 'could have no effect to restrict the new state in any of its attributes as an independent sovereign government,' and both these cases were cited upon this point with approval in Ward v. Race Horse, 163 U. S. 504, 511, 512. * * * See also Shively v. Bowlby, 152 U. S. 1, 27."

Little, if any, light is shed by United States v. Gettysburg El. R. Co., 160 U. S. 668, which deals with the right of the United States, under appropriate legislation, to exercise the right of eminent domain within a state for a national purpose.

We have already referred to the great case of Kansas v. Colorado, 206 U. S. 46, which discusses the right of the

state as contrasted with that of the national government, and the effect of the Tenth Amendment to the Constitution, and also the application of Section 3 of Article 4, and shows that the latter provision cannot be deemed to grant legislative control over the state.

Curtin v. Benson, 222 U. S. 78, is authority for the proposition that rules adopted by the Secretary of the Interior must meet the test of reasonableness, and that it is not competent for the Secretary of the Interior to limit essential rights of property in land held within the national park, and that a condition cannot be imposed by the secretary with respect to the right of use under the guise of a regulation.

It may be observed in passing, concerning Rule 18 of the "General Regulations" that this does not state the obnoxious conduct for which one may be excluded from the park, and by the terms of that section, the superintendent of the park is given the uncontrolled discretion as to readmittance of a person found to be "obnoxious by disorderly conduct or bad behavior", and under this the superintendent may continue to exclude the "obnoxious" person for any reason. The idea here is that the superintendent may create the crime and thereupon banish forever the person found guilty. Nor are owners of lands in the Park excluded from the application of this rule.

It is difficult to see how such a rule finds justification in anything said by this court in Curtin v. Benson.

The opinion in the Robbins case also relies upon Light v. United States, 220 U. S. 523. That case is a companion case of United States v. Grimaud, 220 U. S. 506, dealing with a similar authority of the Secretary of Agriculture to promulgate reasonable rules and regulations. These are explained in the later case of Omaechevarria v. State of Idaho, 246 U. S. 343, in the following language:

> "Congress has not conferred on citizens the right to graze stock on the public lands. The government

has merely suffered the lands to be so used. It is *because* the citizen possesses no such right that it was held by this court that the secretary of agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom."

In the instant case, Congress has conferred upon citizens the right to utilize highways laid out on the public domain, and thereby the general control of these roads comes within the appropriate sovereignty of the state.

The Utah Power & Light Company case (243 U. S. 389) dealt with the control which the United States properly may exercise over its own land.

In the Robbins case this decision was referred to as upholding the view that Robbins could not question the rule because he had not made application for a permit.

In the instant case, it is not gainsaid that under Section 4 of the Act of 1915, the Secretary of the Interior has a right in his discretion to control the land of the United States.

But in the Utah case the United States stood ready to permit the company to continue in the possession of public land upon condition only that it conform to the legislation of congress. In that case the company claimed that the Act of February 15, 1901, concerning the acquirement of rights of way through public lands was totally inapplicable to it, and that no consent, grant or permit was required to render its occupancy legal. Notwithstanding the fact that the regulations there under consideration concerned land to which the company had no vested right, it was nevertheless considered by this court that the regulations must conform to the test of reasonableness. The act in question authorized the Secretary of the Interior to permit the use of rights of way under "general regulations to be fixed by him."

In discussing the question of the reasonableness of the regulations, this court says:

> "In the nature of things it can hardly be said that all are invalid, and this was conceded in argument."

But in the instant case there are no regulations other than a mere prohibition of use.

It is a misnomer to call a concession granted by contract a regulation at all. (Curtin v. Benson, 222 U. S. 78.)

In the Utah case, it is apparently conceded by this court that even with respect to land in which the company had no vested right, there would have been no necessity for an application in event the rules laid down by the secretary were invalid because unreasonable, but in the case at bar, as in the Curtin case, the power to lay down the rule itself is nonexistent.

It is because the roads in question are not the property of the United States, and it is because the general public has a vested right of use of these roads, that the executive authority is without the power to lay down the alleged rule which amounts merely to a total prohibition.

But, if the case is to be viewed from the standpoint of "reasonableness", we believe that there is no case other than that of Robbins v. United States, in which it is held that it is a condition precedent to the right to assail a regulation as unreasonable, to recognize the regulation to the extent of seeking action thereunder by applying for a permit, except in those cases where there is a right conferred by the legislature of total prohibition. It would appear extreme to claim that a party, whose rights are affected, must comply with a void rule as a condition precedent to his right to assert that it is void.

With deference to the view expressed by the Circuit Court of Appeals in Robbins v. United States, that the

language of Sections 2 and 3 of the Act of 1915 is not apt to except the control over roads by the Federal government, and that it should be presumed such control was contemplated by Congress, we suggest that the considerations advanced cannot support the conclusion reached, because the control without the exceptions would have remained in the appropriate sovereignty of the state, and if the construction of that Court should be conceded, the concession would not afford a warrant for the exertion of the particular power asserted by the government.

As to the problem of construction suggested by the Court, it may be said that there are no municipalities in the Park area, and if "municipal ownership" does not apply to the roads, the reference is meaningless.

But it was the duty of the Court to ascribe a meaning to all of the language used, and it is not suggested that the expression "municipal ownership" by definition is not properly referable to the ownership of highways.

So, that court's deduction of an intent to confer control over the highways by reference to Section 4, which requires that the regulations shall provide for the use of automobiles, we deem not to be tenable.

Probably the provision was incorporated because of the practice formerly prevailing to exclude automobiles from national parks, notably from the Yellowstone Park.

But the rule we are here dealing with is not a regulation, but a prohibition.

It is conceivable that without the reference to "regulations for the use of automobiles", the executive authority under a concept that the use of automobiles was not in the public interest, might debar automobile owners from the use of government lands in parking their machines or from establishing stations for the use of passengers, and thus effectually prohibit the use within the Park of automobiles by anybody.

At the present stage of development in transportation, such a prohibition as that, doubtless would be deemed unreasonable, although a specific exception had not been incorporated in the Act.

Our concept of the exception is that it was incorporated out of excess of caution by Congress, and in view of the practice theretofore prevailing in other parks, and that it cannot be used by implication to enlarge the grant of power actually made.

It is said in the decision under consideration that (the state) "may by legislative enactment effectually cede jurisdiction over lands to the government for its purpose, and the acceptance by it will then be presumed."

But as to this, the acceptance cannot be presumed contrary to the language of the Act creating the park, which prescribes reasonable rules, including rules for the use of automobiles, and the claim here made by the state is that the rules under attack are in conflict with the prescription of the statute.

The authority here asserted by defendant and his superiors, of control by exclusive contract is contrary to the language of the statute, which confers all of the power which the federal officers possess. This makes the rule void under the authority of Curtin v. Benson.

The decision in Robbins v. United States lays stress upon the Act in which the consent of the state is given to the United States to acquire any land in the state for any purpose of the government. These Sections are 6900 and 6901 of the Revised Statutes of 1908, and are found at Sections 493 and 494 of the Compiled Laws of 1921.

They are as follows:

> "493. The consent of the State of Colorado is hereby given in accordance with the 17th clause, 8th section of the first article of the constitution of the

United States, to the acquisition by the United States for purchase, condemnation or otherwise, of any land in this state required for custom houses, court houses, post offices, arsenals, or other buildings whatever, or for any other purposes of the government.

"494. Exclusive jurisdiction in and over any lands so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except the service of all civil and criminal process of the courts of this sta' but the jurisdiction so ceded shall continue no r than the said United States shall own such 'and."

This act was passed in 1907, at which time a large part of the area of the State of Colorado was owned by the United States.

It will hardly be contended that it was the intention or effect of the act to abdicate all authority of the state over the lands held in national ownership, nor that under the decisions of this court, to which we have referred that the United States could exert the exclusive power of government over the area of national lands.

The reference, in Section 493, "for any other purposes of the government" we think, would necessarily be limited to the class of uses referred to by the expression "required for custom houses, court houses, post offices", etc.

If this should be thought to have reference to the roads in the National Park, it should be observed that the "land" included in the rights of way is not the "land" of the United States.

So it was perceived that the right of the United States could not be grounded on the statute alone, but something in the nature of a grant, was necessary on which to base the decision in the Robbins case.

This was found in the resolutions of the State Highway Commission and the Board of Commissioners of Larimer County.

Those resolutions do not undertake to cede the roads nor do they undertake to convey the land on which they are situated, but instead the object is to transfer the "control, management, maintenance and supervision" but only that "now exercised" by these respective boards.

In the nature of the case, if it is thought that either the County Board or the Highway Board had the right to exercise the power to bargain away these roads, it should be incumbent upon the defendant to make a showing in that behalf.

Their power is a matter of local and not of national concern.

In Colorado it has been held that a city cannot alienate property devoted to a specific purpose. This was in the case in which the City of Colorado Springs undertook to confer a right upon the county authorities to erect a court house in a park within the city.

In McIntyre v. Board of Commissioners, 15 Colo. Apps. 78; 61 Pac. 237, it was said:

> "It is not disputed either, that the City of Colorado Springs acquired, and has the right to control and regulate the use of, this square, as trustee for the people of the city, and is bound to perform the duty. In such case it is well settled by the universal current of authority that the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication. The trustee cannot impose upon it any servitude or burden inconsistent with these purposes, or tending to impair them. Neither can it alienate the ground, nor relieve itself from the authority and duty to regulate its use." (Citing numerous cases.)

It was contended in that case that power existed in the city to vacate streets and public grounds. It was held that, at the time of the dedication, power did not exist for

the vacation of parks, but it was said that "conceding that the statute of 1877 controls, it is of no avail to defendant in this case, because there is no attempted exercise of the power there given. The complaint in this case is not of any attempted vacation of this square or park, but of an attempted appropriation of a portion of it for a use inconsistent with the purposes of the dedication, and of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square."

It was held that the case could properly be determined without the presence of the city, it being said:

> "It is the county authorities who are seeking to use the property in question for a purpose foreign to its dedication, and the suit against them is in the nature of a suit by a *cestui que* use to prohibit a violation of the trust, or a destruction of the right of the user."

Similarly, it was held in Colburn v. Board, 15 Colo. Apps. 90, 61 Pac. 241, that a county cannot bargain away the rights and interests of the public.

The Court in Robbin's case deduced a specific authority in the Highway Commission and in the County Board of Larimer County to cede general jurisdiction to the federal government, referring in this connection to Chapter 78, Article 2, Sec. 5 of the Acts of 1917, saying: "The State Highway Commission was given power to make agreements in behalf of the state with the government in any manner affecting the public highways of the state." The Court also referred to the statute which authorizes the board of county commissioners "to lay out, alter or discontinue any road running into or through any county" and "to represent the county and have care of county property and the management of its business and concerns." (R. S. 1908, Sec. 1204.)

The Act of 1917 was repealed by Sec. 35 of Chapter 136, Session Laws 1921.

The language of the Act of 1917 is as follows (P. 255, S. L. 1917): "To make agreements on behalf of the State of Colorado with the United States government or any department of the same in any manner affecting the public highways of the state."

The substitute for this in Session Laws of 1921 (Sec. 14, Sub. 7, P. 368) is: "To make agreements subject to the approval of the governor on behalf of the state with the United States government or any department of the same for the construction or maintenance of state highways." (Sec. 1398, C. L. 1921.)

A grant of jurisdiction is not an agreement, and thus the subject of the resolution made by the Highway Commission is not within the ambit of the Act of 1917, but aside from that consideration, it should have been perceived by the Circuit Court of Appeals that the "agreements" referred to would be agreements in conformity only with the purposes of the dedication of the roads, and that an agreement could not be upheld by which the original dedication would be defeated.

The substituted section of the Laws of 1921 is by way of a legislative construction of the former section.

Similarly, it is not to the point to suggest that under a certain definite procedure a county board can vacate a public highway because, as pointed out in McIntyre v. Board, 15 Colo. Apps. 78, supra, there was not present in the resolution in question "an attempted exercise of the power there given", but instead an abdication of the "right to control the possession and regulate the use of" the roads.

This court says in Wabash R. Co. v. City of Defiance, 167 U. S. 88, by Mr. Justice Brown:

"While municipalities, when authorized so to do, doubtless have the power to make certain contracts with respect to the use of their streets, which are obligatory upon them (New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co., 115 U. S. 650, 6 Sup. Ct. 252; Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273; City Ry. Co. v. Citizens' St. Ry. Co., 166 U. S. 557, 17 Sup. Ct. 653; Indianapolis v. Indianapolis Gaslight & Coke Co., 66 Ind. 396; Indianapolis v. Consumers' Gas-Trust Co., 140 Ind. 107, 39 N. E. 433), the general rule to be extracted from the authorities is that the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions. These bodies exercise only such powers as are delegated to them by the sovereign legislative body of the state. Such powers, however, are personal to the municipalities themselves, and, being conferred for the benefit of the whole people, in the absence of authority to that effect, cannot be bestowed, by contract or otherwise, upon individuals or corporations, in such manner as to be beyond revocation."

Under the foregoing authorities, it was the duty of the Court in Robbins v. United States to construe the statutes conferring power on the highway board and on the county board as granting power to do those things only which were conformable with the original dedication.

But, as construed by the Court, the statutes were unconstitutional insofar as they attempted to confer a jurisdiction which could not be validly exercised by the United States.

If authority could be deduced that a right existed in the board to cede as fully as the legislature of the state could do, it is doubtful if the police power of the state could be bargained away except under the limitations prescribed by Article I, Section 8 of the Constitution.

As said by the Court In re O'Connor, 37 Wis. 379, 19 Am. Reps. 769:

> "True, it appears that the legislature * * * attempted to cede to the United States jurisdiction over the lands upon which the national home was to be located; but if the United States did not actually acquire these lands as a sovereign power, in the mode and for the purpose authorized by the constitution, this act of cession by the legislature is void; for it is not competent for the legislature to abdicate its jurisdiction. * * *"

So, in Pollard v. Hagan, 3 How. 212, at 223 (opinion by Mr. Justice McKinley), it is said:

> "When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states and to invest them with it to the same extent in all respects that it was held by the states ceding the territories. * * * When Alabama was admitted into the union on an equal footing with the original states, she succeeded to all the rights of the sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands, and if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative because the United States had no constitutional capacity to exercise municipal jurisdiction, sovereignty or eminent domain within the

limits of the state, or elsewhere, except in the cases in which it is expressly granted."

After observing that only in the District of Columbia and other places purchased and used for forts, magazines, arsenals, dockyards and other government buildings, "the national and municipal power of government of every description are united in the government of the union", except in cases theretofore mentioned of temporary territorial governments, Mr. Justice McKinley further said:

> "The right of Alabama and every other new state to exercise all the powers of government which belong to and may be exercised by the original states of the Union, must be admitted and remain unquestioned, except so far as they are temporarily deprived of control over the public lands. * * *
>
> "We, therefore, think that the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed to possess, or have reserved by compact with the new states for that particular purpose. The provision of the constitution above referred to shows that no such power can be exercised by the United States within a state" (p. 224).

CONCLUSION.

In conclusion, we say that the State of Colorado is here complaining of an exertion of arbitrary power in excess of the authority conferred upon the defendant and his superior officers by the statute creating the national park, and which could not be legally asserted if the Act in terms had attempted to confer it.

The acts of the defendant under this assertion of power produce the result that the park is diverted from its legitimate purpose to the aggrandizement of a private monopoly,

and to the injury of all of the citizens of the state and of the nation who seek to obtain the advantage of recreation by resort to it.

Nor can the state be blind to the rights of the numerous hotel keepers, who have built up, through many years of effort, their businesses, in large part by reason of the fact that customarily through all of the years, they have afforded convenient means of access to all points of scenic interest within and without the national park, and that these hotel keepers are now debarred from affording this service.

Nor can it be perceived by complainant on what basis of right common carriers for hire of passengers and freight, who have complied with the state laws, can be prevented from enjoying the rights recognized by the state in this park, as well as elsewhere within the state.

The State of Colorado, at least equally with the United States, is interested in the development of this park, and in seeing to it that it shall not be diverted from its purpose.

It need not be apprehended that there will be any lack of cooperation on the part of the state with the national authorities in providing proper police regulations in safeguarding rights of persons and property. There need be no clash of authority between state and nation in this respect, if the governing authority is held to the word of the statute under which the park was created.

This case affords an alarming illustration of the tendency, growing ever stronger, to extend the federal jurisdiction into the field properly occupied by the state. The only protection possessed by the states in resisting such usurpations of power is to be found in the federal courts.

We respectfully urge that the decree below be reversed.

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